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### Neil Walker: Beyond the Black and White of Legal Advice

Posted on October 27 2012

The advice of the Scottish Law Officers may have become highly conspicuous by its absence in recent days, but over the years other prominent figures, including some excellent legal minds, have offered their considered opinion on the implications of Scottish independence for EU membership. The late Sir Neil MacCormick - someone who never let his nationalism get in the way of serious analysis - is one such authority, and his reflections appear particularly instructive today. His view was that we would miss something important and fail to get to the heart of the matter of European membership if we focused solely on international law and the question of the rights and obligations of states.

From the rarefied heights of international law, our findings are bound to be inconclusive. For it is simply unclear whether an independent Scotland should be treated as having continuing membership alongside the rest of the UK, or whether Scotland would have to re-apply, either because it would be deemed to have seceded from the larger UK entity or, more radically, because the UK itself would be treated as having been dissolved - in which case each of its successor states would have to rejoin. This lack of clarity stems from the fact that there is no precedent for the devolved part of an existing EU state becoming independent, and so no definitive answer to be drawn from historical practice. And international law, more generally, does not possess the kind of appellate court institutions which could resolve the doubts and provide us with an authoritative answer in advance.

What is absolutely clear, however, is that Scottish independence would require substantial renegotiation of the terms of membership of the European Union. Questions of representation in European institutions, of budgetary contribution, of participation in the Union's programme of justice and home affairs, and, of course, of membership of the Euro currency, would have to be addressed anew, as would many other important issues. Whether this was done in the context of the accession negotiations of a new state, or through the amendment of the longstanding Treaty agreements amongst existing states, tough choices would have to be made and difficult compromises struck. Certainly, there would be no unilateral right for Scotland to dictate terms, regardless of whether their international law position was treated as one of new or of continuing membership. Whichever route was taken, the terms of Scotland's membership would depend on what all existing members could be persuaded to accept.

Yet this does not mean the answer to the Europe question is purely one of political muscle and bargaining power, or of which self-interested state actors play the best tactical hand. For as MacCormick, himself a former Member of the European Parliament, repeatedly stressed, the European Union is not only an international agreement but also a constitutional entity. All of us who are citizens of the member states are also automatically citizens of the European Union, with a vast range of consequential legal and political rights and obligations which reach into our everyday lives as workers, consumers, traders, travellers and voters. And behind that expansive conception of citizenship stands the founding idea of the Union as a novel political community bringing together not just the states but also all the 'peoples' of Europe. It is precisely this resilient post-War vision, and the accompanying sense that none of the European nations could in good conscience be denied membership, which powered the massive Central and Eastern European enlargement programme of the last 15 years. Against that background of generous expansion, the idea that existing citizens of one entity - the European Union - could have their citizenship removed, or only retained reluctantly and in significantly less favourable terms, just because they voted to leave another entity - the UK - seems quite wrong, quite contrary to the prevailing political ethos of membership. Granted, some member states with their own independence movements to preoccupy them, such as Spain, might not contemplate the prospect of an independent Scotland with any great enthusiasm. But if Scottish independence were to become a political reality, it is hard - and quite at odds with historical precedent - to imagine the resulting membership negotiations taking place other than in a spirit of reasonable mutual accommodation.

Alex Salmond has done himself no favours with his lack of candour on the question of legal advice on the pathways to EU membership, and by the complacent assumption which seemed to lie behind this. His attitude, like that of some of his political opponents, has contributed to an atmosphere in which the question of a right to continuing or renewed membership is seen in unhelpfully black and white terms. Either future membership on the part of an independent Scotland is 'nae bother' - something which will happily unfold according to the nationalists' own agenda, or it is a path strewn with dangerous, unpredictable and perhaps insurmountable obstacles. Regardless of the legal niceties, the true state of affairs it is clearly neither of these extremes, but something in-between.

But, as the referendum debate becomes ever more introspective, we should avoid the danger of treating Scotland as too much of a special case. The question of Scotland's place in Europe must also be placed in a wider context. A need to make decisive long-term commitments in an atmosphere of uncertainty over the fate of our continental political arrangements is a predicament that is far from exclusive to a

newly independent Scotland. In light of the continuing Euro crisis and the broader controversy over the limits to political and economic integration in a polity of over 500 million people, every member state, regardless of internal cohesiveness and the complication of sub-state nationalist aspirations, will be required to make crucial choices about its continuing involvement in the European project in the years to come. And they will do so in a highly unpredictable social and economic environment. As tensions reach a new pitch within the Conservative Party and the Coalition Government over relations with Brussels, and as the prospects grow of a constitutional referendum on EU membership running in parallel with the Scottish vote, the European debate appears nowhere more politically charged, nowhere more susceptible to polarization, and nowhere more open to the prospect of retreat or even exit, than in the traditionally semi-detached British corner of our continent.

Whether or not they decide to leave the British state, therefore, sooner rather than later the Scottish people are bound to face deeply consequential questions over their European future – questions which are just as crucial as the independence choice itself. Here at least, however, the Scottish choice is no more urgent than that which must be faced South of the border, or anywhere else across the 27 states of the European Union.

*Neil Walker is the Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh*

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